



February 22, 2002

Mr. John Steiner
Division Chief
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-0854

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158894. Some of the information responsive to this request was submitted in conjunction with ID# 159021.

The city of Austin (the "city") received two requests for information related to the operation of Brackenridge Hospital:

Request No. 1 (received November 21, 2001 - clarified December 7, 2001):

Any and all documents, including emails, showing correspondence between or among Seton Healthcare Network, the Diocese of Austin, and city staff regarding the "hospital within a hospital" proposal; correspondence between city staff and the Texas Hospital Association "regarding the hospital within a hospital proposal"; documentation of city staff discussions regarding the Ethical and Religious Directives, their meaning and interpretation; information revealing the city's efforts to coordinate request for proposals to agents capable of running the hospital (1994-95 and 2001); and financial data relating to the projected costs of the "hospital-within-a-hospital," including documentation that reveals how that data was compiled and analyzed.

Request No. 2 (received December 6, 2001):

[1.] . . . all transcripts, contracts, working papers, memoranda, and all forms of communication . . . concerning establishment of contract between the City of Austin and Daughters of Charity Health Service of Austin, d/b/a Seton Medical Center . . . to operate Brackenridge Hospital . . . under any and all operational conditions[; and]

[2.] . . . the same information concerning attempts to re-negotiate said contract such that daughters of Charity Health Service of Austin, d/b/a Seton Medical Center . . . might operate Brackenridge Hospital . . . and be exempt from providing public reproductive education and services.

You indicate that clarification of the first request was required and that the requestor responded to your request for clarification, providing additional information which enabled you to identify information responsive to this request. We find that the ten business day requirement of section 552.301(b) of the Government Code was tolled during this period of clarification and that the city's request for decision to this office is therefore timely. *See* Open Records Decision No. 663 at 7 (1999).

Additionally, you tell us that the city contacted the second requestor and informed him that the city considered the first category of requested items overly broad, and asked him to narrow his request. You inform us, however, that no clarification had been received as of the date of your request to this office. Section 552.222(b) of the Government Code provides the following:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

Gov't Code § 552.222(b). Thus, if the city is uncertain about the scope of the request, it may ask the requestor to clarify the request and discuss with the requestor how the scope of the request might be narrowed. As you inform us that the requestor did not submit a clarified request as of the date of your submission to this office, you need not release information that may be responsive to the first category of requested information in the December 6th request. Should the requestor submit such a clarification, however, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See also* Open Records Decision No. 663 (1999) (providing for tolling of ten business day time limit to request attorney general decision while governmental body awaits clarification).

Because the request for financial documents may involve the proprietary or property interests of a third party, Daughters of Charity Health Services of Austin d/b/a Seton Medical Center ("Seton"), you have notified Seton of the request by a letter dated December 20, 2001 in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain

circumstances). Seton responded to the notice and argues the information at issue comprises trade secrets and commercial or financial information excepted from disclosure under section 552.110 of the Government Code. You state that some responsive information will be released to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, 552.110, and 552.111 of the Government Code.¹ We have considered the exceptions claimed and reviewed the submitted information.²

We first address Seton's argument that section 552.110 excepts a portion of the requested information from public disclosure. Section 552.110 protects the property interests of private persons and entities by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Seton argues that the submitted financial information constitutes trade secrets, the disclosure of which will cause substantial competitive harm to Seton.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates

¹Although you argue that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, you offer no independent bases as to why this information is protected under this exception to disclosure. Accordingly, we do not address your section 552.101 claim with respect to the submitted information.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

The governmental body, or interested third party, raising section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999). After reviewing the information at issue and the arguments set forth by Seton, we find that Seton has demonstrated that the financial documents which Seton has designated in its brief as the "Information"⁴ constitute

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁴Seton identifies the following as the "Information" that it seeks to withhold:

- a. Seton Overhead Expense Allocation and Methodology;
- b. Seton Overhead Expense Allocation by entity for fiscal years 1996 through 2002 (estimated)
- c. Summary of Reproductive Services Utilization for fiscal years 1995 through 2000
- d. ENUF statements, balance sheets and detailed income and expense projections from fiscal year 2002 through fiscal year 2005.

commercial or financial information, the release of which would result in substantial competitive injury. The city must therefore withhold from public disclosure the marked financial information under section 552.110(b). We note that Seton does not argue that the remainder of the submitted financial information is subject to any exception from disclosure. Therefore, the city must release that information. As section 552.110(b) is dispositive, we do not address the 552.110(a) claim for the "Information."

You argue that a portion of the submitted information is excepted from public disclosure under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 222 (1979). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision Nos. 310 (1982), 265 (1981). Because this exception extends to "information relating to" the location, appraisals, and purchase price of property, it may protect more than a specific appraisal report prepared for a specific piece of property. ORD 564 at 2. For example, we have concluded that appraisal information about parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *Id.* We have also held that section 552.105 applies to leases as well as purchases of real estate. Open Records Decision No. 348 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting ORD 222). When a governmental body has made a good faith determination that the release of information would damage its negotiating position with respect to a real estate transaction, the attorney general will accept that determination unless the records or other information show the contrary as a matter of law. ORD 564. After examining your arguments and the information you have submitted, we find that section 552.105 is applicable in this instance. The city may withhold the marked information under section 552.105.

You next argue that a portion of the information responsive to the December 6th request is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is,

information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. Based upon your representations and our review of the submitted information, we find that a portion of the information at issue is attorney-client privileged and is therefore excepted from disclosure under section 552.107. We have marked the information that the city may withhold from disclosure under section 552.107.

You claim that the remainder of the information submitted as responsive to the December 6th request is excepted from public disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). After reviewing the remaining submitted information, we conclude that portions of this information contain advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. We have marked the information related to policymaking that the city may withhold under section 552.111 of the Government Code. The remainder of the submitted information must be released to the December 6th requestor.

In summary, the city must withhold from public disclosure the marked financial information under section 552.110(b). The marked information relating to the lease may be withheld under section 552.105. We have marked the information that is attorney-client privileged and is therefore excepted from disclosure under section 552.107. The city may withhold the

marked information related to policymaking under section 552.111. The remainder of the submitted information must be released to the December 6th requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 158894

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